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**EDITORIAL**

Managing environmental risk is a critical component of decision making at all stages of a project – from the original assessment, to designing conditions regarding offsets or rehabilitation obligations, to compliance monitoring and enforcement. This edition explores the outcomes and risk management implications of a number of recent court decisions across the country.

Breellen Warry and Bianca Fernandes review the Land and Environment Court’s decision in *Friends of Tumblebee Inc v ATB Morton Pty Limited*, highlighting the need for consent authorities to carefully determine when Species Impact Statements are required. The case also demonstrates the importance of engaging appropriately qualified experts, and ensuring that supporting information is up to date.

The decision in *Save Beeliar Wetlands Inc v Jacob* also clarifies the obligations on Western Australia’s EPA to take account of its own policies when conducting environmental impact assessments. Andre Maynard discusses the implications of the case for assessments generally and, more specifically, for the imposition of offset conditions.

The recent news that the EPA has laid charges in relation to air pollution offences arising from the Hazelwood Mine fires in 2014 has been welcomed by many. However, Lauren Rickards and Melanie Birkbeck question whether the time taken to finalise the investigation reveals a flaw in Victoria’s environmental laws.

Whether impacts from a project are anticipated from the outset, exceed expectations or result from non-compliance, the strength and enforceability of rehabilitation obligations will often determine how successfully environmental risks are managed. Claire Boyd and Emma McLeod consider the efficacy of Western Australia’s Mining Rehabilitation Fund and the possible reinstatement of performance bonds, while Karen Trainor and Kathryn Pacey examine proposed changes to Queensland laws in the wake of the Queensland Nickel situation to allow related entities and others to be ordered to take on rehabilitation responsibilities.
Chris Schulz and Kate Kirby also review the Victorian Supreme Court’s application of the polluter-pays principle, reminding those responsible for historic contamination that clean-up responsibilities may continue despite change of ownership.

Finally, Bridget Phelan and Bronwyn Woodgate discuss the recommendations of the Independent Review of Victoria’s Climate Change Act 2010, including suggestions to bolster the State’s climate change response by giving the EPA additional powers to regulate greenhouse gas emissions.

Clarifying legal requirements for both assessment and rehabilitation has the potential to improve the effectiveness of environmental regulation. In combination with strong monitoring and enforcement activities, such changes will be important to secure sustainable outcomes long into the future.

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Court invalidates development consent for failure to prepare a Species Impact Statement

Originally published on 30 March 2016
Breellen Warry\(^1\) and Bianca Fernandes

In its recent decision in *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 2) [2016] NSWLEC 16*, the Land and Environment Court found a development consent to be invalid following the failure to prepare a Species Impact Statement in connection with a proposed development. In this case note, we highlight key features of the decision and implications of the decision for developers and consent authorities alike.

The facts

ATB Morton Pty Limited (ATB) obtained development consent for the construction of an industrial warehouse on land in the Hunter Economic Zone (HEZ) including clearing of 3.2 hectares of potential habitat for the Regent Honeyeater (RH). Friends of Tumblebee Incorporated (Tumblebee) commenced proceedings seeking to have the development consent declared invalid on the basis that the development application (DA) was not accompanied by a Species Impact Statement (SIS), as required under section 78A(8)(b) of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The development site forms part of the HEZ which was previously rezoned to allow employment generating development. Whilst ecological studies were undertaken as part of the rezoning, including consideration of impacts on the RH, in 2007/2008 a significant breeding event occurred within the HEZ.

The Court’s decision

The Court noted the legal principles which apply in determining whether or not a SIS is required, including:

1. whether a SIS is required is an essential precondition to the granting of consent;
2. as a mandatory requirement, the Court must consider the factors in s 5A of the EP&A Act, known as the “seven part test”; and
3. other relevant factors include the cumulative impacts of the proposed development and the potential application of the precautionary principle.

Applying the relevant factors of the seven part test the Court concluded (among other things) that:

- Paragraph (a) of the seven part test relates to whether the proposed action is likely to place the RH at risk of extinction. Although the experts agreed that in the short term, the direct effect of the proposed development was unlikely to lead to extinction, the Court adopted a cumulative approach including impacts from approved clearing granted for other developments in the HEZ which amounted to 135.2 hectares. In conjunction with the application of the precautionary principle, the Court found that the development posed a threat of serious or irreversible environmental damage and at worst, extinction of the RH.

- Paragraph (d) relates to impacts on habitat, including its removal, modification, fragmentation and the importance of the habitat to the long term survival of the RH. The Court determined

\(^1\) Partner, Holding Redlich. Contact Breellen or Bianca if you would like to discuss this case.
that a more nuanced approach to ‘habitat’ should be adopted and contemplated the further fragmentation of the RH habitat more generally within NSW, particularly with regard to other approved clearing the HEZ. For example, because of the highly mobile nature of the RH, the proposed clearing may remove a ‘stepping-stone’ in the chain of productive habitat in the RH’s annual cycle of movement.

- Paragraph (g) relates to whether the development is a key threatening process. The clearing of native vegetation and the “aggressive exclusion of birds from woodland and forest habitat by abundant Noisy Miners” are both key threatening processes under schedule 3 of the *Threatened Species Conservation Act 1995.*

The Court held that the clearing, although relatively small in area, would indirectly or in the long-term be likely to significantly affect the RH or its habitat. As such, because a SIS was required but did not accompany the DA, the subject development consent was declared to be invalid.

**What this case means**

*Ensuring a SIS is prepared, if required*

It is well settled that the question of whether or not a SIS is required is a jurisdictional fact. Also, as mentioned, satisfaction of the requirement is an essential precondition to the granting of consent to a development application. As such, if it is found that a SIS was required based on the threshold test under the EP&A Act, and one was not provided with the DA, then the consent authority’s power to grant consent would not have been enlivened and any decision in relation to that DA may be exposed to a risk of challenge. Therefore, careful consideration should be given to whether an SIS is required.

*Considering cumulative impact*

The case also recognises the relevance of cumulative impact and the application of the precautionary principle when dealing with threatened species, populations or ecological communities (and their habitats). For example, although the proposal involved clearing of a small area, in the context of the large amount of land already cleared in the HEZ and the importance of the HEZ for the habitat of the RH, the cumulative impact was held to be “significant”. Importantly, the Court said that the cumulative impact is a relevant matter for not only the seven part test, but as a separate factor given the broad discretion of the decision-maker in section 78A(8)(b).

*Choosing the right experts*

For applicants, the choice of experts can be critical in any Court proceedings. The Court in this case expressed concerns in relation to the credibility of ATB’s expert witness. For example, ATB’s expert was a general ecologist and not a specialist ornithologist. In addition, the Court highlighted the expert’s association with the extractive and development industries being, until recently, the general manager of a coal mining company. The expert was also found to have applied the wrong meaning to phrases in the threshold test, including “likely” and demonstrated a “degree of carelessness” in preparing certain evidence.

*Considerations for decision makers*

For decision makers, as is highlighted by this case, careful consideration needs to be given to each mandatory requirement when determining a DA. Here, although the Council’s town planner had prepared a report recommending refusal of the DA, the Council resolved to approve the DA on the basis that extensive ecological studies had been undertaken at the rezoning stage and the area to be cleared was small. However, because of the 2007/2008 breeding event, the ecological status of the HEZ had changed since the rezoning. In addition, the cumulative impacts meant that, because of the land already approved for clearing in the HEZ, the likely impact of the proposed development on the RH was significant. Therefore, it was not enough that the Councillors had turned their minds to the impact on the RH based on previous ecological reports.
The case of Save Beeliar Wetlands (Inc) v Jacob [2015] WASC 482 (SBW v Jacob) has generated significant public interest. The case itself has provided much needed clarity on the proper approach to be taken by the Environmental Protection Authority (EPA) as to how it takes account of its policies when conducting environmental impact assessments (EIA) of proposed projects and has highlighted issues with the provision of environmental offsets.

Save Beeliar Wetlands (SBW), represented by Castledine Gregory, challenged the validity of the decision made by the EPA to recommend to the Minister for Environment that Main Roads’ project to extend the Roe Highway from Kwinana Freeway to Stock Road (Roe 8) may be implemented subject to certain conditions. The decision of the Minister to the effect that Roe 8 may be implemented subject to conditions was also challenged.

The Court held that the EIA undertaken by the EPA was invalid and also that the Minister’s decision to allow Roe 8 was invalid, as the EPA took no account of its policies at the time it made its decision and provided its report to the Minister.

Summary of Policy Issues

The applicants sought judicial review of the EPA’s and the Minister’s decisions on a number of grounds, one being the EPA’s lack of consideration of 3 of its own policy statements relevant to the provision of environmental offsets during the EIA of Roe 8. These statements set out a policy that where the EPA concludes that a project will result in significant residual impacts to critical environmental assets (ie. conservation category wetlands (CCW)) after all efforts to mitigate those impacts have been made, then the EPA would not consider the provision of environmental offsets to be an appropriate means of making such a project environmentally acceptable and there would be a presumption that the EPA would recommend to the Minister that the project not be implemented.

Whilst the EPA concluded that Roe 8 would result in significant residual impacts to critical environmental assets (including the loss of 5.8ha CCW, 7ha Bush Forever reserve and 112ha of fauna habitat), the EPA made no reference to its stated policy position. Instead the EPA Report was “fundamentally inconsistent with and indeed contrary to” EPA policy by including a recommendation that Roe 8 was environmentally acceptable if adequate environmental offsets (ie. parcel/s of land) were provided. Further, and importantly, there was no reference to the EPA’s policy contained within these 3 policy statements in any minutes of the meetings of the EPA, nor in any briefing notes provided to the EPA, in which Roe 8 was considered, in the 3 years prior to the decision of the EPA on this project.

In holding both the EPA Report and the Minister’s decisions invalid, the Court held that due to the characteristics of the process of EIA within the Environmental Protection Act 1986 (WA) (EP Act), the EPA was bound to take account of policies which it has developed to facilitate the performance of its EIA functions. This conclusion flows from the general structure of the EP Act under which the development of administrative procedures and policies is the responsibility of the EPA, from the features of the EIA process and from the consequences which would occur if the EPA was free to publically announce and publish policies relating to EIA and then ignore them. Martin CJ also stated

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1 Senior Lawyer, Castledine Gregory. Please contact Andre if you would like to know more about this case.
that if the EPA was not obliged to take its policies into account the proponent, government and members of the public who engage in the EIA process are likely to be misled and the requirements of procedural fairness are unlikely to be met because many of those involved in the process would be proceeding on the basis of a false premise.

In holding the EPA Report and Minister’s decision invalid the Court held that it will be for the EPA to determine, in the light of the Court’s reasons and current circumstances, the steps which must be taken to undertake and complete an EIA of Roe 8 which conforms to the obligations imposed upon the EPA by the EP Act.

**Broader implications for decision-makers**

The judgment has direct relevance for all levels of government with respect to the extent to which a decision-maker must take into account policies which he/she has formulated as a condition of the valid exercise of the power to which those policies relate. *SBW v Jacob* reinforces the critical need for decision-makers to understand their legislative obligations. Whether a decision-maker must have regard to their policies requires an understanding of the statutory regime and an understanding of the subject matter, scope and purpose of the relevant Act.

**Conclusion**

The decision in *SBW v Jacob* is significant from various perspectives. From an administrative law perspective the decision has provided clarity on the statutory interpretation process used to ascertain whether an obligation to take a particular matter into account in the exercise of jurisdiction can be derived from the relevant Act.

From an environmental law perspective *SBW v Jacob* has brought a powerful lens on the legislative role of the EPA. The decision reaffirmed the independent role of the EPA in the EIA process by clarifying that a government’s expressed view on the social utility of a project is irrelevant to the function of the EPA, which must be focussed on the assessment of environmental impacts and the identification of appropriate conditions to which its implementation should be subject.

*SBW v Jacob* also provides a valuable legal commentary on the role of environmental offsets in the EIA process. The question of how environmental offsets actually mitigate or ameliorate adverse environmental impact was raised by Martin CJ who went on to mention that there is a cogent argument to the effect that unless there is a real or appreciable risk of the environmental degradation of the (offset) land, the mere act of acquisition and maintenance of that land does not mitigate or ‘offset’ the environmental degradation of other land in any material way.

Ultimately as a matter of public interest, the judgment provides the public, the government and proponents with reassurance that when a particular EPA policy applies to a component of the EIA process, that policy will also be required to be taken into account by the EPA at the relevant part of the assessment.

**Postscript:** The Western Australian government has appealed against this decision.
Two-year wait for Hazelwood mine fire charges shows system needs to change

Originally published on 16 March 2016

Lauren Rickards and Melanie Birkbeck

Victoria’s Environmental Protection Authority has brought charges against four companies over the Hazelwood coal mine fire, which burned for 45 days in February and March 2014, blanketing the nearby town of Morwell in smoke.

The charges allege that the pollution from the fire broke environmental laws by making the air:

• noxious or poisonous or offensive to the senses of human beings;
• harmful or potentially harmful to the health, welfare, safety or property of human beings;
• detrimental to any beneficial use made of the atmosphere.

The charges follow a two-year investigation featuring several inquiries into the fire, including a report which concluded that the blaze probably contributed to deaths in the community.

The mine’s operator is already facing charges from Worksafe Victoria, which it says it will defend. It is majority-owned by the power multinational GDF Suez (known internationally as Engie).

Some, including Victoria’s environment minister Lisa Neville, have raised questions over why it has taken so long for the EPA to lay its own charges. This chimes with our ongoing research, which indicates that Australian citizens and campaign groups have less power to bring environmental prosecutions than in other comparable countries.

Compare and contrast

We compared the situation in Australia with an Italian case involving another Engie subsidiary, Tirreno Power. In 2014, while Hazelwood was burning, Tirreno’s coal-fired power plant in Vado Ligure, Italy, was seized and shut down in response to judicial findings that the company had...
violated its environmental conditions, causing hundreds of deaths and thousands of illnesses as a result of the facility’s emissions.¹⁰

Unlike at Hazelwood, there was no single disaster such as a fire, but rather a realisation of the damage being done by chronic pollution.

In Italy, not only is environmental protection improving under the guidance of the European Union, but citizens also have their own systems to report potential violations, balancing to some degree the rights of corporations against those of other parties. In the Tirreno case, the campaign group Rete Savonese Fermiamo il Carbone (Savonese Stop the Coal Network) was instrumental in raising the issue and ultimately securing a victory for local citizens.

Victorian state laws have some similar provisions, particularly under the Occupational Health and Safety Act. If a citizen feels that an incident has breached health and safety laws and authorities do not prosecute within six months, they can make a written request to Worksafe Victoria to prosecute.

This is probably how Worksafe’s recent action against GDF Suez came about. Acting on behalf of campaign group Voices of the Valley, Environmental Justice Australia asked Worksafe to pursue legal action.¹¹

But similar provisions do not exist under Victoria’s environmental laws, which date back to 1970. Only the EPA can bring charges, but if it chooses not to, there is no way for citizens to ask the authority to reconsider.

Citizens’ rights

In some ways this is rather startling. It begs the question of who will uphold environmental standards if the regulator chooses to look the other way. It is little wonder that citizens are resorting to protest and media pressure to be heard.

Meanwhile, there are worrying signs that corporations are being given special privilege on account of their role as drivers of economic development. This includes mining companies who, for example, have until recently been relatively free simply to abandon mines once extraction has finished. Even now they only have to pay nominal rehabilitation bonds, with the result that Hazelwood is one of roughly 50,000 abandoned mine sites¹² across the country, many of which pose serious risks. The current Hazelwood Mine Fire Inquiry report on mine rehabilitation at the site was due March 15, but this has been delayed for an unspecified period or reason.¹³

Society’s capacity to call on governments to prosecute is clearly mediated by how the law defines who can take legal action. The federal government’s ongoing bid to strip green groups of the right to challenge environmental approvals¹⁴ is case in point.

The Hazelwood fire has exposed many environmental issues. But the slow pace of the investigation also highlights a real weakness in our legal system. Making this system more just and democratic is vital – not just to increase our capacity to respond to catastrophic events like the Hazelwood fire, but also to begin tipping the balance of power back towards society and away from corporations who must always be fully accountable.

¹¹ See https://envirojustice.org.au/blog/worksafe-to-prosecute-hazelwood-power-corp-over-mine-fire
¹³ Editor’s note: The Victorian Government has since announced that the report will be delivered on 7 April 2016: http://hazelwoodinquiry.vic.gov.au/
Rehabilitation liabilities – a big diamond mess!

Originally published in March 2016

Claire Boyd\textsuperscript{15} and Emma McLeod\textsuperscript{16}

When the Mining Rehabilitation Fund was established in 2013, it was lauded as being a great thing for the mining industry. Transition to the fund came at a time when capital markets were beginning to tighten and it presented an opportunity for much needed cash to be refunded to those who want to spend that money on the ground. By early 2015, more than $1 billion in unconditional performance bonds had been returned to the mining industry and more than $33 million had been collected in levies for the Mining Rehabilitation Fund.

More recently, we have seen the first mine site in Western Australia being declared as an abandoned site for the purposes of the Mining Rehabilitation Fund and now, in light of the events regarding the Ellendale Diamond Mine (Ellendale), the consequences of that change in regulation are coming into question.

Background

By way of background, Ellendale is located on Mining Lease 4/372 and is accessed via an access road over Miscellaneous Licences 4/26 and 4/48. These mining tenements were granted under the Mining Act 1978 (WA) (Mining Act) to Kimberley Diamond Company NL (KDC), a subsidiary of Kimberley Diamonds Limited.

Recent events

Administration and appointment of liquidators

In July 2015, KDC appointed administrators and all mining activities at Ellendale ceased. In August 2015, KDC’s creditors placed KDC into liquidation. KDC’s assets were to be auctioned off by the appointed liquidator in September 2015, but no appropriate offers were received.\textsuperscript{17}

Liquidator’s Notice of Disclaimer of Onerous Property

On 19 October 2015, KDC’s liquidators issued a ‘Notice ofDisclaimer of Onerous Property’ under section 568A(1)(b) of the Corporations Act 2001 (Cth) and disclaimed any rights, interests and property held by KDC in the mining tenements.

This is the first time this provision has been used by a liquidator with respect to a WA mining project. With respect to other mining projects in WA placed into liquidation, these have remained with the company in liquidation until a buyer had been found.\textsuperscript{18}

Rehabilitation liability

It has been estimated that a rehabilitation liability of between $28 million and $40 million exists with respect to the Ellendale site. It appears that KDC did not set aside funds for rehabilitation after it cashed out approximately $12 million in unconditional performance bonds in 2013 when it elected to contribute towards the Mining Rehabilitation Fund established under the Mining Rehabilitation Fund Act 2012 (WA) (MRF Act). By comparison, and consistent with the requirements of the MRF Act, $818,826.40 was contributed to the Mining Rehabilitation Fund with respect to the Ellendale site.

\textsuperscript{15} Partner, Gilbert + Tobin. Email Claire to discuss the issues raised in this article.
\textsuperscript{16} Lawyer, Gilbert + Tobin. Contact Emma.
\textsuperscript{17} Nick Evans, ‘Bit-by-bit sale for Ellendale’, The West Australian, 3 September 2015
\textsuperscript{18} Nick Evans, ‘Liquidators try to dump mine’, The West Australian, 21 October 2015
On 4 December 2015, the CEO of the WA Department of Mines and Petroleum (DMP) declared the Ellendale site to be an abandoned site for the purposes of clause 9(1) of the MRF Act. Accordingly, the DMP is able to provide the funding to complete the on-ground works required to keep the site safe, stable and non-polluting. The DMP has advised however that the site will not be fully rehabilitated and closed through the Mining Rehabilitation Fund as it remains a viable resource project.

**Phosphate Australia Limited’s (Phosphate) forfeiture application**

On 21 October 2015, Phosphate (who controls the neighbouring Blina project) filed a forfeiture application over Mining Lease 4/372 for non-payment of fees and royalties. This application fell between the date of the liquidator’s Notice of Disclaimer of Onerous Property and the expiry of the 14 day period for DMP to challenge the notice.

If Phosphate is successful in its application, it will have a right in priority to apply for a mining tenement over the area of Mining Lease 4/372 free from the rehabilitation liabilities incurred by KDC. This will prevent the DMP from finding a buyer for the site together with its rehabilitation liabilities.

However, a file notation area is noted against the area of Mining Lease 4/372 providing that any application for a mining tenement made with respect to the area of Mining Lease 4/372 would be subject to the Minister’s powers under section 111A of the Mining Act and may be refused in the public interest.

**What now?**

A decision is still pending with respect to Phosphate’s forfeiture application.

The DMP has also requested that the Mining Warden make a ruling as to whether the Ellendale mining tenements still exist – in other words, whether the disclaimer operates to extinguish the tenements themselves or just KDC’s interest in them. A decision on this is yet to be made but will be vital in determining the DMP’s ability to prevent similar situations.

Given these provisions of the Corporations Act 2001 have not been used before in this context, it is unlikely that specific consideration was given to this scenario when the Mining Rehabilitation Fund was established. In most cases it is likely that the value of the project will outweigh the obligations such that a liquidator will be able to find other options besides disclaiming the assets. However, while these rights remain as currently provided for in the Corporations Act, the risk of this occurring again in the future continues.

In the meantime, it is possible that the State will consider bringing back performance bonds in order to secure rehabilitation obligations for amounts which may be as high as 100% of the estimated rehabilitation cost with respect to the relevant tenement, given the Minister has retained the right to require such bonds under the Mining Act. The DMP may even look to the model adopted in the Northern Territory where both securities equivalent to 100% of the cost of rehabilitation and an annual levy equivalent to 1% of the value of the environmental rehabilitation security must be provided.

Another option for the State is to consider implementing new legislation like the Queensland Government is in the process of doing (i.e. imposing a chain of responsibility to ensure environmental obligations are complied with) in order to address concerns from recent events such as the difficulties at the Queensland Nickel Refinery.

This will be an interesting space to watch and we will be keeping you informed as matters progress.

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19 Western Australia, *Western Australian Government Gazette*, No 181, 4 December 2015, page 4854
20 Ellendale Information Sheet 1, Department of Mines and Petroleum Western Australia, December 2015
21 Nick Evans, "Twist for Ellendale tenements", *The West Australian*, 1 February 2016
Extended legal responsibility for environmental harm on the way in Queensland

Originally published in March 2016
Karen Trainor and Kathryn Pacey

More persons and entities, such as related persons or companies, could be required to clean up or pay for compliance or rehabilitation of land under proposed amendments included in the Environmental Protection (Chain of Responsibility) Bill 2016.

What are the changes?
The Bill proposes to implement various mechanisms to prevent and remediate environmental harm by expanding the liability of entities who are related companies, a landowner or another person the Department of Environment and Heritage Protection (DEHP) decides has a relevant connection (generally a financial or management connection) with the company.

The Bill also allows DEHP to impose financial assurance conditions on the transfer of an environmental authority and extends DEHP’s cost recovery, investigation and enforcement powers.

Many of the amendments will take effect retrospectively, which is directed at ensuring that companies cannot now change control or structures to avoid the impact of the proposed changes.

How the chain of responsibility laws would work
The "chain of responsibility" amendments are relevant to the circumstances in which an environmental protection order has issued or when a company becomes a "high risk company".

The Bill allows an environmental protection order to be issued to a "related person" of the company and to a related person of a high risk company where the company is undertaking an environmentally relevant activity.

An environmental protection order can require management actions, rehabilitation and restoration actions and bank guarantees or other securities to ensure compliance with the Environmental Protection Act 1994.

The key terms are "related person" and "high risk company":
- a "related person" is a holding company, a landowner or another person DEHP decides has a relevant connection (generally a financial or management connection) with the company. In the Minister’s first reading speech it is stated that it is not intended that the chain of responsibility will attach itself to genuine arm’s-length investors, such as merchant bankers or mum-and-dad investors or impact contractors or employees, although this is not carved out in the Bill;
- a "high risk company" is a company in external administration or an associated entity of the company in external administration.

DEHP decides who has a relevant connection with the company based on a broad range of considerations.

22 Partners, Clayton Utz. Email Karen or Kathryn to discuss the proposed legislation.
In addition to being able to impose any requirement on the related person that could be imposed on the high risk company, the environmental protection order may require a related person to:

- comply with any requirements to secure compliance (including in relation to an environmental authority that is no longer held by the company);
- take action to prevent or minimise environmental harm including from contaminants on land on which the activity has been carried out, regardless of whether the activity was the source of the contaminants;
- rehabilitate or restore land from an environmentally relevant activity or from contaminants regardless of whether the activity was the source of the contaminants;
- give a bank guarantee or other security to secure compliance with the environmental protection order.

**What’s next for the Bill?**

This Bill would introduce potentially far-reaching changes, and may require corporate entities to consider and obtain advice on potential liabilities for prevention and remediation of environmental harm in appropriate circumstances.

The Bill was introduced without proceeding through consultation external to Government, but it has been referred to the Agriculture and Environment Committee to report by 15 April 2016.

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**Polluter Pays Principle in Action**

*Originally published on 23 February 2016*

**Chris Schulz** and Kate Kirby

In a recent decision of the Victorian Supreme Court, a Melbourne municipal council was held liable to compensate a landowner for the costs that were incurred by the landowner in the course of complying with a clean-up notice issued under the *Environment Protection Act 1970 (Vic)*, despite the pollution having occurred prior to the commencement of that Act.

**Background**

The relevant site located in Burnley, Victoria was Crown land in the possession of the City of Richmond (the predecessor to the Yarra City Council) (the Council). Around the turn of the century, the Council used the site as an abattoir and quarry. From around 1916, the Council relevantly built and operated a brick refuse destructor and tar distilling plant with a 'masonry' storage tank for coal tar on the site. From 1961, the abattoirs on the site were leased to a third party. Photographs of the site from 1964 show that the area where the storage tank was located was covered with rubble. The Council was required to relinquish possession of the site to the State of Victoria in 1996.

The site was sold by the State of Victoria to the Metropolitan Fire and Emergency Services Board (the Landowner) in May 2004, following the lodging of a planning permit application for a new community safety and training facility around six months earlier.

A planning permit was subsequently granted, but by July 2005, construction of the new facility had to be stopped when a test hole identified coal tar. The Victorian Environment Protection Authority

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23 Associate, Allens
(EPA) subsequently issued a clean-up notice which required the Landowner to engage an environmental auditor to submit an environmental audit report to the EPA.

The Decision

Section 62A(2) of the Environment Protection Act 1970 (Vic) (the Act) provides that an occupier can make a claim for the cost of complying with a clean-up notice from a number of people including someone who caused or appears to have abandoned the pollution. The original form of this provision of the Act was first introduced by the Environment Protection (Review) Act 1984 (Vic), long after the Council had undertaken the relevant operations at the site, but before the Council relinquished possession of the site in 1996.

The court considered whether the Council was liable for the clean-up costs under s62A(2) on the basis that:

- s62A(2) applies with respect to pollution which was caused or permitted prior to the commencement of the Act (under s62A(1)(b)); and/or
- the Council 'abandoned' the industrial waste in the bluestone pit when it relinquished possession of the site in 1996 (under s62A(1)(c)).

Section 62A(1)(b): Did the Council 'cause or permit' the pollution?

Despite the passing of time, the court held that there was sufficient evidence to support the fact that the Council had used the bluestone pit for the storage of coal tar and that it had therefore caused or permitted the pollution.

A key issue for resolution was whether s62A(2) could apply to pollution that was caused prior to the introduction of the statutory provision. The Council submitted that because it was acting lawfully at the time that it caused the pollution, the legislative intent was that the provision should not apply retrospectively.24

This question had previously been considered in Premier Building & Consulting Pty Ltd (receivers appointed) vs Spotless Group Ltd (2007) 64 ACSR 114, where Justice Byrne held that the presumption against the retrospective application of statutes did not apply.25 Therefore, similar to the fact that clean up notices could be issued to require the remediation of pollution that pre-dates the commencement of the statutory provision providing the power to issue the notices, so too the person responsible for the pollution under statute could 'be called upon to compensate the remediator'.26

Justice Riordan followed the reasoning in the Spotless case.27 Further, Justice Riordan held that consistent with the 'polluter pays principle' in s1F(2) of the Act, it was the statutory intent that 'the liability of the person who caused the pollution to compensate the innocent recipient of the notice would not be limited to pollution caused after the commencement of the Act.'28

Section 62A(1)(c): Did the Council appear to 'abandon' the industrial waste in 1996?

The court also considered whether the Council was liable for the remediation of the site on the basis that the action of vacating the site in 1996, without remediating the coal tar, constituted 'appearing to have abandoned' the industrial waste.

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24 Metropolitan Fire and Emergency Services Board v Yarra City Council [2015] VSC 773 [166]
26 Ibid.
27 Metropolitan Fire and Emergency Services Board v Yarra City Council [2015] VSC 773 [164]
28 Ibid [168]
Despite the fact that the Council officers and employees were not aware of the coal tar in the bluestone pit at the time that the Council relinquished possession of the site, the court still held that the Council had ‘appeared to abandon’ the coal tar at the site. The court made this finding on the basis that:

- the Council was aware that there was contamination at the site, and did not clean it up at the time it vacated the site; and
- subjective knowledge is not required for abandonment.²⁹

The court held that abandonment did not occur before the Council vacated the site, because it could have, at any time prior to this, dug out the bluestone pit and reused the coal tar.³⁰ The fact that the Council was forced to relinquish possession of the site does not mean that it had not abandoned the waste, because although it was required to leave the site, it was not required to leave the coal tar.³¹

Other claims

The Landowner also made a variety of other claims against the Council regarding breach of statutory, planning and other duties, however, these claims were unsuccessful. In particular, the court held that individuals do not have a private right of action for breach of the pollution of land offences under the Act.

What does this mean for you?

This case is an example of the ‘polluter pays principle’ in action. Polluters, and former polluters, need to be aware that statutory liability for remediation remains with the polluter, regardless of whether the pollution occurred prior to the commencement of the Act, whether the site has been vacated, relinquished or sold and regardless of other contractual arrangements that may be in place dealing with any potential land contamination.

What’s next?

The Council has reportedly confirmed that it will appeal against the decision.³² Allens will continue to monitor and report on any significant developments with respect to this appeal.

²⁹ ibid [177]
³⁰ ibid [177]
³¹ ibid [178]
³² Helen Jones, Thomson Reuters Environmental Manager, ‘Vic Supreme Court ‘polluter pays’ ruling will be appealed, council says’ (2 February 2016)
The release of the report of the Victorian Independent Review Committee in February 2016 proposes major changes to the regulatory framework for climate change in Victoria. In particular, it suggests establishing new targets to cut emissions, implementing a legally binding Charter of Climate Change Objectives and Principles and providing additional powers to the Environment Protection Authority Victoria (EPA) to regulate greenhouse gas emission.

This article provides a background of the Review and highlights the key recommendations which, if approved by the Government, will bolster the climate change regulatory framework in Victoria.

Key recommendations

If implemented, these recommendations would make climate change a central part of decision making, open to enforcement by legal challenge.

- Charter to provide a broad legal standing to enable certain individuals and groups to challenge the legality of decisions, as well as possible limited merits review of some decisions;
- Application for approvals, licences and major transport infrastructure pursuant to a range of legislation must consider climate change impacts in the decision making process such as the Planning and Environment Act 1987; Mineral Resources (Sustainable Development) Act 1990; and Major Transport Projects Facilitation Act 2009.
- EPA provided with more powers to regulate GHG emissions.

Background

Globally, climate change is a hot topic in light of the success of the 21st Conference of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC) in December 2015 in Paris.

At the COP21, the signatories committed to hold the increase in the global average temperature to well below 2 degrees above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5 degrees.

In mid-2015, the Victorian Government announced a review of the Climate Change Act 2010 (Review). The Review was completed on 30 December 2015 and a report, including findings and recommendations of the Independent Committee, was tabled in Parliament by the Minister for Environment, Climate Change and Water on 11 February 2016. The Government is considering the recommendations and will release the Government’s response shortly.

Timing of the Review

The Act was passed by the Victorian Parliament in September 2010 and came into effect on 1 July 2011. The Act was reviewed in late 2011, triggered by the introduction of the Clean Energy Act 2011 by the Commonwealth Government. This is the second review of the Act.
Public submissions were invited from 6 July to 10 August. More than 100 individual submissions were received, along with around 1550 campaign submissions.

Recommendations

The report makes 33 recommendations to significantly amend the regulatory framework for climate change in Victoria. Some of the key recommendations are summarised below.

1. Emissions reduction target

The report recommends that the Act include a long-term emissions reduction target that is based on the best available science and that can be adjusted in light of new information. The report does not specify a long-term target, however it states that the target should, ‘at the very least, place Victoria on a pathway to pursuing efforts to limit the temperature increase to 1.5 degrees Celsius’.

In addition, the report proposes that the Act introduce a process for rolling multi-year interim emissions reduction targets to support delivery of the long term target. The process would indicate a maximum level of GHG emissions for Victoria.

2. EPA

The report recommends that the Government reinstate the EPA’s power to regulate GHG emissions from facilities that the EPA regulates.

Specifically, the report recommends that the EPA be equipped to ‘use its powers to issue an amend licences to achieve significant reductions’ in GHG emissions, and recommends amendments to the SEPP (Air Quality Management).

The report also proposes vesting the Environment Minister with a ‘clear legal power’ to implement measures to reduce emissions at source, whether through EPA licensing, establishing a trading scheme, adopting carbon taxes, or accelerating the phase-out or upgrade of high-emitting facilities.

3. Expansion of the Decision Making Framework and Schedule 1

At present, the Act creates a legal obligation on decision makers to consider climate change where relevant and where decisions are made under legislation specified under Schedule 1.

The report recommends a substantial expansion to the legislation stated in Schedule 1. This will require decision makers to undertake an assessment of climate change impacts or risks, or whether they will significantly impact the pursuit by Government of climate change mitigation and adaptation and disaster risk reduction. The report includes the following examples for inclusion in Schedule 1 (which already applies to Catchment and Land Protection Act 1994, Coastal Management Act 1995, Environment Protection Act 1970, Flora and Fauna Guarantee Act 1988, Public Health and Wellbeing Act 2008 and Water Act 1989):

- Development of council plans under the Local Government Act 1989;
- Development of risk management strategies under the Financial Management Act 1994;
- Approvals under the Planning and Environment Act 1987;
- Decisions about timber allocations under the Sustainable Forests (Timber) Act 2004;
- Decisions to grant licences and approvals for coal and coal seam gas, under the Mineral Resources (Sustainable Development) Act 1990; and
- Decisions about major transport infrastructure under the Major Transport Projects Facilitation Act 2009.
4. Charter

The report notes a key weakness of the Act is that it does not effectively promote the consideration of climate change in government decision making.

To address this, the report recommends the implementation of a Charter of Climate Change Objectives and Principles. Similar to the Victorian Charter of Human Rights and Responsibilities 2006, the climate charter would be given legal force and provide a broad legal standing to enable certain individuals and groups to challenge the legality of decisions. This aims to ‘improve statutory compliance and accountability, and ensure that government decisions are consistent with Victoria’s best practice regulatory principles’.

5. Other proposed changes

In addition to the above, the following recommendations were made:

- Update the Act to reflect the current policy context and legislation implemented since the commencement of the Act that may require an assessment of either climate change impacts or risks, or significant impacts to the delivery of climate change mitigation and adaptation and disaster risk reduction outcomes.
- Preparation of ministerial guidelines to assist decision makers to understand their statutory obligations under the Act.
- Implementing a merits reviews mechanism for specified Schedule 1 decisions in certain circumstances. However, the IRC notes that at present there is no administrative tribunal which possesses sufficient expertise to carry out a merits review
- The Government to prepare a climate change plan every 5 years, to outline the proposals to cut emissions and include plans from major departments to adapt to climate change threats.
- Improve forestry, carbon sequestration and carbon soil rights.
- Calculation of the potential future liability arising from government actions and decisions, procurement and investments that will contribute to climate change.
MEMBER PROFILE: NATASHA HAMMOND

Natasha Hammond is a barrister at Martin Place Chambers in Sydney. Her practice encompasses planning, environmental and administrative law, and environmental crime. She also lectures in environmental law at the University of New South Wales.

Natasha is the Secretary of the National Environmental Law Association.

What do you enjoy about your job?

The best thing about being a barrister is the wide variety of work that you get exposure to; every day is different. For example, I might appear at a criminal hearing in the Local Court in regional NSW; in the Supreme Court for a Notice of Motion hearing, at a planning conciliation commencing on site before a Commissioner of the Land and Environment Court, or as junior counsel in judicial review proceedings. I also enjoy working for many different clients, whether it be a developer, a local council or a community group.

What do you think will be the key environmental law issues over the coming decade?

In Australia, management of our water resources for environmental and human consumption needs, and balancing those often competing priorities, will continue to be a key issue particularly with the anticipated increase in impacts of climate change. Loss of biodiversity will continue to be a challenge. There will also be increased focus on adaptation to more sustainable ways of living, including waste, consumption and renewable energy.

Why do you think NELA is important?

Having been a member of NELA for many years and a board member since 2015, I consider NELA to be an important forum for discussing environmental law issues at a national level and to forge strong connections between the many different professionals working in environmental law at State level. The conference, in particular, is always a great opportunity to engage with national environmental issues and to catch up on what other states are doing.

What advice would you give a young practitioner?

Stay open to all opportunities as you progress in your career, look for great mentors, and find out what your passion is. You are our future leaders, and great leaders inspire others with their passion and confidence.